

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 07-01
(December 17, 2007)

**Propriety of Pro Tempore Limited Jurisdiction Judge
Practicing Criminal Law in Superior Court**

Issues

1. May an attorney who represents defendants in felony cases serve as a pro tempore judge over misdemeanor cases filed in justice and city courts in the same community?

Answer: Yes.

2. May a pro tempore limited jurisdiction judge preside over criminal, civil traffic and other cases involving police officers as witnesses when the judge regularly represents defendants as an attorney in felony cases involving the same officers?

Answer: Yes, with qualification.

3. May a pro tempore limited jurisdiction judge hear cases involving law enforcement officers who were sued in a civil case brought several years ago by the judge's former client?

Answer: Yes.

Facts

An attorney who represents defendants in criminal cases also serves as a part-time, pro tempore justice of the peace and city magistrate in various courts throughout his county. Prior to being appointed as a pro tempore judge, the attorney undertook to represent an individual indicted on several serious felonies. After determining that his client's civil rights might have been violated by law enforcement officers and agencies, the attorney arranged for another attorney to join the criminal case as counsel of record.

After the criminal charges were dismissed, the second attorney filed state and federal civil lawsuits against the law enforcement agencies and officers, and invited the first attorney to file notice of appearance in the cases, which he did. The attorney received no remuneration for his limited work on the civil cases, and he later withdrew from the cases after being appointed as a pro tempore judge. Since then, the attorney has no longer represented defendants in the justice or city courts where he serves as a judge pro tempore. However, he continues to represent defendants in the superior court and may occasionally investigate the actions of law enforcement officers in felony cases.

Some police officers now question the judge's ability to act impartially in cases in which they are involved in the justice and municipal courts.

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Discussion

Issue 1

In Advisory Opinions 95-08 and 95-17, this committee stated that service as a criminal defense attorney and as an occasional pro tempore criminal court judge is permissible. The opinions were based on Section D(3) of the Application provisions of the Code of Judicial Conduct, which states that “a pro tempore part-time judge who serves once or only sporadically in a specialized division of a court or in a court without specialized divisions may appear as a lawyer in such specialized division or court during such service.” In this instance, the judge in question serves on a regular basis as a pro tempore part-time judge in the justice and city courts while also working as a criminal defense attorney in the superior court in the same county.

While some jurisdictions do not allow a part-time judge to work as a defense attorney in the same county, *see* Utah Informal Op. 07-2, the Arizona code permits part-time judges to practice law in the same court in which they serve as noted above. In addition, part-time judges who serve on a “continuing scheduled basis” may appear as a lawyer in the same court under the conditions set forth in Sections D(4) and D(5). A part-time judge may not appear as a lawyer in the same division in which he sits as a judge, or the same court if there are no divisions, but he or she may practice law in other divisions and other courts. The commentary that accompanies this section also permits a lawyer who sits on a continuing scheduled basis as a pro tempore part-time justice of the peace in one precinct to appear as a lawyer in a justice court in another precinct or another community within the same county. Application Section D, commentary, examples 4 and 5.

Clearly, the intent of the supreme court in allowing these exceptions is to encourage lawyers to serve as part-time judges in areas that may have a limited number of both lawyers and full-time judges. In other words, the court wants to increase the availability of qualified pro tempore judges while making sure they adhere to the provisions of the judicial code governing impartiality and the appearance of impartiality. Given this rationale, it is just a short step from the examples noted above to allowing a lawyer who sits as a part-time pro tempore judge in a justice court or city court to practice criminal defense law in the superior court in the same county.

Issue 2

Canon 2A requires judges to promote public confidence in the impartiality of the judiciary. The commentary to Canon 2 states: “The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” Canon 4A provides that “a judge shall conduct all of the judge’s extra-judicial activities so that they do not (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge”

The issue presented is the perception of police officers, who may interact one day with the judge acting as a defense attorney zealously representing his client, and the next day as

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a judge weighing the officer's testimony and rendering decisions. The Texas judicial ethics committee found it problematic for a part-time judge who heard criminal cases to represent a police officer in a civil matter: "A defendant who is aware of the fact that the judge hearing his case also privately represents police officers employed by that very same municipality could reasonably doubt that the judge was impartial when considering the testimony of any police officer and the weight to be given thereto." Texas Op. 288 (2003). A police officer vigorously cross-examined by defense counsel, who then appears as a witness with that defense counsel now acting as judge, may have similar qualms regarding the judge's fairness. A distinction could be made that the police officer is a witness, not a party to the case, and is not facing loss of liberty at the hands of the judge, but Canon 2 requires the judge to promote the "public's" confidence in the impartiality of the judiciary, and that includes law enforcement officers.

The committee is concerned about the appearance of impartiality engendered by the above situation, but is constrained by the fact that the judicial code in our state permits an attorney to serve as part-time pro tempore judge and practice law in the same county, which implicitly includes handling criminal cases. The commentary to Application Section D states, "the purpose of Section D is to allow the greatest possible use of part-time pro tempore judges" This being the case, the committee is unable to provide a bright-line answer. On balance, the committee concludes a part-time pro tempore judge may hear cases involving police officers as witnesses when the judge regularly represents defendants as an attorney in felony cases involving the same officers, but we caution the judge to recuse himself from a particular case when warranted by the circumstances.

Many felony cases may be quickly resolved by a plea agreement, and defense counsel may have little or no contact with the law enforcement officers involved in the case. At other times, the facts of the case and the duties of defense counsel may require actions that the officer may perceive as attacks upon his or her competence or integrity, particularly if the case is a contentious one. A judge must review each assigned case to determine if he or she may hear the matter, given any non-judicial contact the judge may have had in felony cases with the same officers involved in the misdemeanor case.

Issue 3

Canon 3E(1) requires "a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" In this instance, the judge represented a defendant in a criminal case that subsequently evolved into a civil case against police officers and a municipality. His last direct involvement with the officers regarding the case would have occurred prior to the dismissal of the criminal charges in August 2004. The judge had limited involvement in the civil case and withdrew from it in January 2007 when he was appointed to the bench.

It is not unusual for an attorney experienced in criminal law, either as a prosecutor or defense counsel, to become a judge. Attorneys, police officers, and other persons who interacted with the judge before he or she assumed the bench may question whether the judge

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is influenced by prior involvement in the criminal justice system, but this concern is not sufficient to cause automatic disqualification from all criminal cases. The judge must review each case individually to determine if his or her prior non-judicial interaction with the attorneys, defendant, police officers or others involved in a case create a situation or appearance requiring disqualification under Canon 3E(1).

Given the circumstances here, especially the passage of time, we find no reasonable basis for the law enforcement officers to speculate that the judge may be biased against them solely on the basis of his involvement in the prior case.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 2, commentary, and Canons 2A, 3E(1) and Application Section D(3) (2004).

Other References

Arizona Judicial Ethics Advisory Committee, Opinions 92-16 (reissued March 8, 1993), 95-08 (May 3, 1995), and 95-17 (August 25, 1995).

Texas Committee on Judicial Ethics, Opinion 288 (2003).

Utah Ethics Advisory Committee, Informal Opinion 07-2 (May 22, 2007).